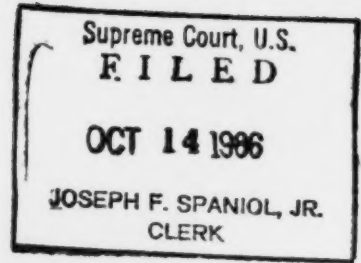


86 -7 43



In the
Supreme Court of the United States

October Term, 1986

No. _____

WILLIAM K. ZIECHMANN, et al.,
Petitioner,

vs

CHARLOTTE ADOMAITIS, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals
of Ohio, Eighth District,
Cuyahoga County

Matthew Gilmartin, *Counsel of Record*
9267 Basswood Drive
Olmsted Falls, Ohio 44138
(216) 235-9755
Counsel for Petitioner

QUESTION PRESENTED

1. Whether dismissal of the Plaintiffs' complaint for failing to state a claim upon which relief can be granted and res judicata, in contravention of Ohio Revised Code §2717.02, denied the Plaintiffs due process of law as guaranteed under the XIV Amendment to the United States Constitution, by denying the Plaintiffs their day in Court.

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William K. Ziechmann, et al.,
Petitioners,

vs.

Charlotte Adomaitis, et al.,
Respondents.

**Petition for a Writ of Certiorari
To the Court of Appeals of Ohio
Eighth District, Cuyahoga County**

Petitioners, William K. Ziechmann, et al., prays that a writ of certiorari issue to review the judgment Court of Appeals of Ohio, Eighth District, Cuyahoga County, and the Court of Common Pleas of Cuyahoga County, dismissing the Plaintiffs' Complaint for declaratory relief, the imposition of a constructive trust, and damages, on the basis that the Plaintiffs' complaint failed to state a claim upon which relief can be granted and res judicata, as per Ohio Rule of Civil Procedure 12(B) (6).

PARTIES

Petitioners:

William K. Ziechmann
John Ziechmann
Dietz Ziechmann
Karin Ziechmann
Alexandra Ziechmann

Respondents:

Charlotte Adomaitis
Rippner, Schwartz, & Carlin
Angela Carlin
Richard Schwartz
Sanford Schwartz
City of Shaker Heights, Ohio
William Gollnick
Lore Gollnick
Theodore Gollnick
Mark Gollnick
Timothy Flanagan
Carey N. Gordon

OPINIONS BELOW

Denial of the Plaintiffs' Motion to Appeal to the Supreme Court of Ohio (App. 1) is not yet reported.

The opinion of the court of Appeals of Ohio, Eighth District, Cuyahoga County, rendered March 13th, 1986, (App. 3) is unreported.

The Findings of Fact and Conclusions of Law and Opinion, by the Court of Common Pleas of Cuyahoga County, rendered September 4th, 1985, (App. 13) is unreported.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on July 16th, 1986. This Court has jurisdiction under 28 U.S.C.A. §1257(3). The issue of O.R.C. §2717.02, and by inference the XIV Amendment to the U.S. Constitution was first raised in Petitioners' Motion to Certify to the Supreme Court of Ohio.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to United States Constitution, section 1., which states:

1. ***No State shall make or enforce any law which shall abridge the privileges or immunities of a citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law,***.

Section 2717.02 of the Ohio Revised Code, "FORCE AND EFFECT OF DECLARATORY JUDGEMENTS."

"Courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed. *No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for.* The declaration may be either affirmative or negative in form and effect. Such declaration has the effect of a final judgment or decree."

STATEMENT OF THE CASE

Plaintiff-Petitioner, William K. Ziechmann, is a beneficiary (nephew) of the Estate of F. Karl Ziechmann, who died testate on December 20th, 1978. According to the terms of the will, certain parcels of land were to pass into a testamentary trust, the beneficiaries of which were the Plaintiff-petitioners in this action. It was not until almost four years after the will was probated that a trustee was appointed to this testamentary trust who could protect the interests of the beneficiaries. Between the time the will was presented for probate and when a trustee was finally appointed, Executrix Charlotte Adomaitis sold the real property which was to be the res of the trust. This sale took place without the consent of a majority of the beneficiaries as required by the terms of the will. The executrix did this upon the fraudulent pretext that the value of the estate's debts exceeded the value of the estate's personal property. Since the executrix violated her duty to satisfy the debts of the estate by first exhausting the personal property assets of the estate before selling any of the estate's real property, the Plaintiff-petitions brought an action for declaratory judg-

ment that the sale of the property by the defendant-respondents was illegal and violated the terms of the will. A trial by jury and money damages were asked for in the pray for relief.

The appeal is from a judgment of the Court of Common Pleas dismissing Plaintiff-Petitioners' complaint as failing to state a claim upon which relief can be granted and res judicata. This judgment was affirmed by the Eighth District Court of Appeals, Cuyahoga County, Ohio, and the plaintiff-appellants' Motion to Certify to Supreme Court of Ohio was denied.

REASONS FOR GRANTING THE WRIT

§2717.02 of the Ohio Revised Code state in its pertinent part: "No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for." The plaintiff-petitioners asked for a declaratory judgment, and the Court of Common Pleas dismissed the case on this basis and that of res judicata. Res judicata is vacated by fraud, which the plaintiff-petitioners averred in their complaint. The Courts' of Ohio dismissal of the plaintiff-petitioners' complaint denied them due process of law in violation of the XIV Amendment to the U.S. Constitution, by denying them their day in court.

Respectfully submitted,

Matthew Gilmartin
Attorney for Petitioners
9267 Basswood Dr.
Olmsted Falls, Ohio 44138
(216) 235-9755
Counsel for Petitioners

APPENDIX



THE SUPREME COURT OF OHIO

William K. Ziechmann,	:	Case No. 86-750
et al.,	:	
Appellants	:	July 16th, 1986
	:	
-vs-	:	
	:	
Charlotte Adomaitis,	:	
et al.,	:	
Appellees.	:	

Upon consideration of the motion for an order directing the Court of Appeals for Cuyahoga County to certify its record and the claim appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

Frank D. Celebrezze
Chief Justice

**COURT OF APPEALS OF OHIO
EIGHTH DISTRICT CUYAHOGA COUNTY**

William K. Ziechmann,	:	Appeals No. 50264
et al.,	:	
Appellants	:	April 7th, 21986
-vs-	:	
Charlotte Adomaitis,	:	
et al.,	:	
Appellees.	:	

Motion by appellant for reconsideration is overruled.

John V. Corrigan
Presiding Judge

Parrino, C.J. &
Ann McManamon, J. Concur

**COURT OF APPEALS OF OHIO
EIGHTH DISTRICT
COUNTY OF CUYAHOGA COUNTY
NO. 50264**

William K. Ziechmann,	:	Journal Entry
et al.,	:	
Plaintiff-	:	March 13th, 1986
Appellants	:	
-vs-	:	
Charlotte Adomaitis,	:	
et al.,	:	
Defendant-	:	
Appellees.	:	

JUDGMENT:

AFFIRMED.

This is an appeal from a judgment of the Common Pleas Court dismissing plaintiffs' complaint for declaratory judgment pursuant to Civ. Rule 12(B)(6).

Plaintiff, William K. Ziechmann, is a beneficiary (nephew) of the estate of F. Karl Ziechmann who died testate on December 28, 1978 leaving a will and five codicils.¹

Plaintiffs sought a declaration that the sale by defendant of a house and two parcels of land by defendant executrix Charlotte Adomaitis to defendant City of Shaker Heights was illegal and violated the terms of decedent's will.

¹Also named as plaintiffs are John Dietz, Karin and Alexandra Ziechmann.

Appellants raise the following assignment of error for this court's review:

THE COURT ERRED IN ITS FINDING OF FACT AND CONCLUSIONS OF LAW FILED ON APRIL 16, 1985, IN THE SUBJECT ACTION.

This assignment of error lacks merit.

Appellants specifically argue that appellee Adomaitis had no authority to sell these subject parcels of real property to appellee City of Shaker Heights. Appellants state that there were sufficient funds to pay any personal property obligations of the estate. Appellants also state that appellee Adomaitis failed to notify Probate Court of her intention to sell these parcels of real property in order to satisfy the personal property obligations of the estate.

Pursuant to Item IV of the decedent's will, decedent created a trust for the benefit of appellant William Ziechmann which consisted of residential property located at 2920 Warrensville Center Road, Shaker Heights, Ohio, known as Permanent Parcel No. 733-23-27. In accordance with Items IV and VII of the will, this property was to be sold and one-half of the proceeds were to be held in trust for the benefit of appellant William K. Ziechmann. The sale of the real property at 2920 Warrensville Center Road is not challenged by the appellants.

The City purchased this parcel in addition to two adjacent parcels of land (Permanent Parcel Nos. 733-23-26 and 733-23-12) for the sum of \$160,000. It is the sale of these two adjacent parcels of land that is being challenged by appellants.

Prusuant to Item VI of decedent's will, the residue and remainder of his estate was to be distributed in equal one-half shares to appellant Ziechmann and decedent's niece, Lore Gollnick. This residue and remainder consisted of the two adjacent parcels of land sold to the City. Appellant Ziechmann's share was to be held in trust for his benefit.

In Item IX of the will, the decedent appointed Society National Bank and Charlotte Ziechmann (aka Adomaitis) as co-executors of his will. They were expressly authorized and empowered to:

*“***compound, compromise, settle and adjust all claims and demands in favor of or against my estate, and to sell at private or public sale, at such prices and upon such terms and conditions as they may deem best, any part or all of my property, real or personal, needed to pay debts or general bequests, and to execute, acknowledge and deliver deeds and other instruments of conveyance therefore to the purchaser or purchasers.”* (emphasis added).

Society National Bank declined to act as co-executor of decedent's estate, and appellee Adomaitis applied for Testamentary Letters and become sole executrix of the decedent's estate.

The assets of the estate wre determined to be \$270,948.71, seventy-two percent of which consists of real estate, and the debts of the estate were determined to be \$119,187.26.²

The record indicates that it was plaintiffs' position that the debts of the estate did not include fiduciary and attorney fees, administrative costs and expenses and

Ohio and Federal estate taxes. According to appellants' calculation, the debts of the estate totalled \$46,715.22 only, which would mean that the sale of these parcels was unnecessary.

R.C. §2117.25(A) provides that costs and administrative expenses are debts of the deceased and are properly payable out of the assets of the estate.

It is well settled that the amount of Federal estate tax is to be deducted like other debts and expenses of administration. *Campbell v. Lloyd* (1954), 162 Ohio St. 203; *Weeks v. Vandever* (1968), 13 Ohio St. 2d 15.

²The assets are composed of the following:

Tangible personal property (including monies in various bank accounts, items of personal property, furniture and household goods).	\$ 44,313.35
Intangible personal property (including various notes and debts receivable).	30,885.36
Real Property	<u>195,948.00</u>
	<u><u>\$270,948.71</u></u>

The debts include: fiduciary and attorney fees, administrative costs and expenses, debts and claims against the estate, Ohio and Federal estate taxes.

An executor's fees are statutorily provided and are properly considered to be administrative expenses. R.C. §2113.35. Pursuant to R.C. §2113.36, the Probate Court may grant the executor additional compensation for actual and necessary expenses and for extraordinary services not required of him in the ordinary course of his duty. *In re Estate of Brown* (1954), 98 Ohio App. 297. The Probate Court made such a finding in the present case.

Also, R.C. §2113.31 provides for management of real estate by an executor or administrator. An executor of a will is not required to comply with procedural requirements where the will specifically directs the executor to sell property. *Bilikam v. Bilikam* (1982), 2 Ohio App.3d 300.

Thus, appellants' position that appellee Adomaitis had to notify Probate Court of her intention to sell these parcels is incorrect.

An independent basis for appellees' motion to dismiss was *res judicata*. The record indicates that the third partial accounting approved by Probate Court included the proceeds from the sale of the two vacant lots. At no time did appellants file exceptions to the accounting objecting to the sale of these parcels as provided in R.C. §2109.33. The court duly ordered this account approved, settled and recorded.

R.C. §2109.35, Effect of order settling account, provides that an order of Probate Court upon the settlement of a fiduciary's account has the effect of a judgment and may only be vacated as provided in that statute.

The court in *Third National Bank & Trust Co. v. Gardner* (C.P. 1970), 53 Ohio Op.2d 261, decided that a declaratory judgment proceeding is not one of the

methods provided in R.C. §2109.35 for vacating an order of the Probate Court upon the settlement of a fiduciary's account.

R.C. §2109.35 provides in pertinent parts:

A person affected by an order settling an account shall be deemed to have been a party to the proceeding wherein such order was made if such person was served with notice of the hearing thereon in accordance with section 2109.33 of the Revised Code, waived such notice, consented to the approval of the account, filed exception thereto, or is bound by section 2109.34 of the Revised Code; ***.

The Probate Court specifically found that all persons required to be given notice of the hearing had been given notice or had waived notice.

An adjudication by the Probate Court that certain inventoried property constitutes assets of a decedent's estate is res judicata as to the parties of such proceeding unless successfully appealed. *Bolles v. The Toledo Trust Co.* (1940), 136 Ohio 517; *In re Estate of Binder* (C. P. 1937), 25 Ohio Law Abs. 472.

Therefore, appellants should have filed exceptions before the Probate Court. Once the account was settled and approved, a judgment was in effect entered which could only be vacated as provided in R.C. §2109.35. A declaratory judgment was not the proper method of doing so.

For these reasons, we conclude that the trial court acted properly in dismissing appellant's complaint for declaratory judgment.

Appellants' assigned error is overruled.

Judgment affirmed.

It is ordered that appellee(s) recover of appellant(s) their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

John V. Corrigan, J.
Nahra, P.J. and
Ann McManamon, J.,
Concur.

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

William K. Ziechmann,	:	Case No. 77198
et al.,	:	
	:	FINDINGS OF FACT
Plaintiffs	:	AND CONCLUSIONS
	:	OF LAW AND OPINION
-vs-	:	
	:	
Charlotte Adomaitis,	:	September 4th, 1985
et al.,	:	
	:	
Defendants	:	

The Court finds that F. Karl Ziechmann died testate on December 28, 1978 and attempted to distribute his entire estate through his Last Will and Testament of May 5, 1975. Item VI of decedent's Will stipulated that (A) the residue and remainder of the decedent's estate and (B) two vacant parcels of land, located at 2970 Warrensville Center Road, be distributed in equal one-half shares to William K. Ziechmann and Lore Gollnick, Item VI further stipulated that the testamentary share left to William K. Ziechmann was to be placed in a trust and held for the benefit of William K. Ziechmann.

The Executrix of decedent's estate, Charlotte Adomaitis, sold said two parcels of real property, in which William K. Ziechmann had a one-half interest, to the City of Shaker Heights in order to satisfy the outstanding debts of decedent's estate.

Plaintiff, William K. Ziechmann, seeks a declaratory judgment from this Court in order to void the sale of the two parcels of real property to the City of Shaker Heights, to place said property in trust for the plaintiff, and to grant money damages as a result of the alleged illegal

sale of real property. The defendants have filed a motion to dismiss plaintiff's action based upon several arguments.

I. Civil Rule 12(B)(6)—Plaintiff's complaint fails to state a claim upon which relief can be granted as a result of (1) Executrix was duly authorized by Will to act as Executrix and (2) decedent's Will specifically granted the Executrix authority to sell real property.

Decedent's Will jointly appointed Society National Bank and Charlotte Adomaitis as executors of his Last Will and Testament. Society National Bank specifically declined the appointment as executor and said declination was noted and recorded upon the Court's docket. Upon the refusal of Society National Bank to serve as executor, Charlotte Adomaitis properly applied for Testamentary Letters as required by O.R.C. §2113.12. The Probate Court granted Charlotte Adomaitis' application and ordered Letters Testamentary forthwith.

§2113.39 of the Ohio Revised Code provides that if an executor is authorized by the decedent's Will to sell real property, no order shall be required from Probate Court to authorize such sale.

§2113.39 Sale of property under authority of will. (GC § 10509-227)

If a qualified executor, administrator, or testamentary trustee is authorized by will or devise to sell any class of personal property whatsoever or real estate, no order shall be required from the probate court to enable him to act in pursuance of the power vested in him. A power to sell authorizes a sale for any purpose deemed by such executor,

administrator, or testamentary trustee to be for the best interest of the estate, unless the power is expressly limited by such Will.

Item IX, of the decedent's Will, expressly empowered the Executrix to sell any real or personal property in order to satisfy debts of the estate or general bequests. The Executrix was faced with a cash shortage and needed a cash flow in order to satisfy the debts of decedent's estate. Therefore, as permitted by decedent's Will, the Executrix sold two parcels of land, located at 2970 Warrensville Center Rd., to the City of Shaker Heights for a price of \$24,000.00 over the appraised value of the real property in question.

Since Charlotte Adomaitis was duly appointed as Executrix and decedent's Will clearly authorized the sale of real property, the sale of the two vacant lots to the City of Shaker Heights was valid and plaintiff's demand for the invalidation of said sale is groundless. Clearly plaintiff fails to state a claim upon which relief can be granted and said claim should be dismissed pursuant to Civil Rule 12(B)(6).

II. Plaintiff's action is barred by the doctrine of Res Judicata

Defendant's second basis for dismissal of plaintiff's action involves the doctrine of Res Judicata. §2109.35 of the Ohio Revised Code states that an order of fiduciary's account shall have the effect of a judgment. In this particular case, four separate partial accountings were approved by the Probate Court. The third partial accountings were approved by the Probate Court. The third partial accounting included the sale proceeds from the sale of the two vacant lots. This third accounting was

submitted to and approved by the Probate Court. Plaintiff made no objections to the sale of the land in question at the time of the third accounting.

The failure of the plaintiff to timely object to the sale of the property in question and the approval of the third partial accounting by the Probate Court is now Res Judicata as to the plaintiff.

IT IS, THEREFORE, ORDERED based upon the failure of the plaintiff to state a claim upon which relief can be granted and the concept of Res Judicata, that plaintiff's action is hereby dismissed with prejudice at plaintiff's costs, pursuant to Civil rule 12(B)(6).

Judge John E. Corrigan

(2)
No. 86-743

Supreme Court, U.S.
FILED

DEC 2 1986

JOSEPH F. SPANIEL, JR.
CLERK

Supreme Court of the United States

October Term, 1986

WILLIAM K. ZIECHMANN, *et al.*,
Petitioner,

VS.

CHARLOTTE ADOMAITIS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF
APPEALS OF OHIO, EIGHTH DISTRICT,
CUYAHOGA COUNTY

BRIEF OF RESPONDENT, CITY OF SHAKER HEIGHTS, OHIO, IN OPPOSITION

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Telephone: (216) 781-1212

*Counsel for Respondent City of
Shaker Heights, Ohio*

QUESTIONS PRESENTED

Whether dismissal of an action by an Ohio state court based upon application and interpretation of Ohio law in a case where no federal question or due process violation is raised presents a case suitable for review by the United States Supreme Court on the dismissed party's petition for Writ of Certiorari.

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No. 86-743

Supreme Court of the United States

October Term, 1986

WILLIAM K. ZIECHMANN, *et al.*,

Petitioner,

VS.

CHARLOTTE ADOMAITIS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF
APPEALS OF OHIO, EIGHTH DISTRICT,
CUYAHOGA COUNTY

**BRIEF OF RESPONDENT, CITY OF
SHAKER HEIGHTS, OHIO, IN OPPOSITION**

**STATUTORY PROVISIONS OMITTED FROM
PETITIONER'S BRIEF**

Ohio Revised Code Section 2109.35

Effect of Order Settling Account:

"The order of the probate court upon the settlement of a fiduciary's account shall have the effect of a judgment and may be vacated only as follows:"

Ohio Revised Code Section 2113.39

Sale of Property Under Authority of Will:

"If a qualified executor, administrator, or testamentary trustee is authorized by will or devise to sell any class of personal property whatsoever or real estate, no order shall be required from the probate court to enable him to act in pursuance of the power vested in him."

Ohio Revised Code Section 2117.25

Order in Which Debts to be Paid:

"Every executor or administrator shall proceed with diligence to pay the debts of the deceased, and shall apply the assets in the following order:

(A) Costs and expenses of administration;"

Ohio Revised Code Section 2127.01

Sale of Lands by Executors and Administrators

"All proceeds for the sale of lands by executors, administrators, and guardians shall be in accordance with section[s] 2127.01 to 2127.43, inclusive, of the Revised Code *except* where the executor has testamentary power of sale, and in that case the executor may proceed under such sections or under the will." (emphasis added)

28 U.S.C., Section 1257(3):

State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) *By writ of certiorari*, where the validity of a treaty or statute of the United States is drawn in

question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or *where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States.* (emphasis added)

COUNTERSTATEMENT OF THE CASE

A. Proceedings in the State Courts of Ohio

This case was first brought in the Probate Court, Cuyahoga County, Ohio, by Petitioner William K. Ziechmann ("Ziechmann"), on behalf of himself and others as beneficiaries under the Last Will and Testament of F. Karl Ziechmann. On May 16, 1984, Petitioner Ziechmann voluntarily dismissed the action in the Probate Court as to certain other named Plaintiffs. On June 7, 1984, Petitioner filed a Notice of Dismissal Without Prejudice as to the entire action, pursuant to Ohio Civil Rule 41(A)(1).¹

Petitioner Ziechmann, again joining other beneficiaries of Decedent's estate as named Plaintiffs, refiled his Complaint in the Common Pleas Court, Cuyahoga County, Ohio, in July, 1984. Petitioner named as Defendants in the case: the City of Shaker Heights, Ohio (the "City"); the law firm of Rippner, Schwartz & Carlin (the "Law Firm"); individual partners of said Defendant Law Firm,

1. In April, 1984, Respondents Adomaitis, the law firm representing her and the individual partners thereof, named as Defendants in the Probate Court action, filed a Motion to Dismiss/Motion for Summary Judgment. Thereafter, Respondent City, also a named Defendant in that case, filed a similar Motion. The Probate Court held a hearing on these Motions, but did not issue a ruling on the merits. Instead, the Court granted Petitioner Ziechmann additional time in which to respond to these Motions. Petitioner responded by dismissing the action in the Probate Court.

and the Executrix of Decedent's estate, Charlotte Adomaitis ("Adomaitis" or "Executrix"). By his Complaint, Petitioner sought a declaratory judgment from the Common Pleas Court specifically to: (1) void the sale of two parcels of real property to Respondent City, which sale had been approved by the Probate Court based upon Respondent Adomaitis' testamentary power of sale in Decedent's Last Will and Testament; and (2) place the real property in trust for Petitioner and other named beneficiaries. In addition, Petitioner sought monetary relief in an unspecified amount for damages allegedly caused by the fraudulent sale of said real property.

Respondent City and other named Defendants in the case promptly filed separate Motions to Dismiss the entire action. These Motions were subsequently opposed by Petitioner. On April 16, 1985, the Common Pleas Court granted Respondents' Motions to Dismiss holding that: (1) Defendant Executrix was empowered by Item IX of the Will to sell the parcels in question and did so to satisfy the debts of the Ziechmann estate; and (2) Petitioner's failure to timely object to the sale, which was finalized and approved by a third partial accounting in the Probate Court rendered the issue of sale *res judicata*. Petitioner's Motion for Reconsideration was denied, and review was then sought before the Court of Appeals, Cuyahoga County, Ohio.

In the Court of Appeals, Petitioner attacked as erroneous the findings of facts and conclusions of law upon which the April 16, 1985 Common Pleas Court decision, as outlined above, was based. Oral argument was held before the Court of Appeals, and on March 13, 1986, the Court issued its Journal Entry affirming the Common Pleas Court decision. Petitioner's Motion for Reconsider-

ation to the Court of Appeals was denied and Petitioner sought review of the case by the Ohio Supreme Court.

Petitioner's Memorandum to the Ohio Supreme Court again attacked as erroneous the Common Pleas Court's findings of fact and conclusions of law set forth in its April 16, 1985 Opinion. No reference was made by Petitioner, however, to either the United States Constitution, generally, or to the Fourteenth Amendment, specifically. In fact, nowhere in Petitioner's Memorandum did the words "due process" or any similar phraseology appear which, as Petitioner claims, would raise "by inference" a constitutional claim of right, title or interest under the Fourteenth Amendment (*See* Petitioner's Brief, page 3; *see also* Appendix A1 through A7 attached hereto). Rather, Petitioner's basis for seeking review by the Ohio Supreme Court was that the case involved issues of public or great general interest (Appendix at A5-A6).

On July 16, 1986, Petitioner's Motion to Certify to the Supreme Court of Ohio was denied.

B. Summary of Essential Facts

F. Karl Ziechmann died testate on December 28, 1978. His Last Will and Testament, as amended by five (5) Codicils, was probated in the Cuyahoga County Probate Court of Ohio on January 19, 1979.

Petitioner Ziechmann was the intended beneficiary of three (3) contiguous parcels of real estate, located in the City of Shaker Heights, which Decedent had owned in fee simple. Pursuant to Decedent's Will, one of the three residential parcels was ordered sold and the proceeds thereof held in trust for the benefit of Petitioner. Petitioner Ziechmann did not contest the sale of the first residential property to Respondent City.

The two vacant parcels of land at issue in this case, were expressly included in the residue of Decedent's estate. According to Decedent's Will, the residue of his estate was to be divided equally between Petitioner Ziechmann and Decedent's niece, Lore Gollnick, with Petitioner's share held in trust for his benefit. The sale of these two parcels to Respondent City was expressly challenged by Petitioner.

Decedent's Will named a Bank in Cleveland, Ohio, and Respondent Adomaitis as co-executors. Pursuant to the Will, the named Executors were authorized to "*sell at private or public sales, at such prices and upon such terms and conditions as they may deem best, any part or all of my property, real or personal, needed to pay debts or general bequests, and to execute, acknowledge and deliver deeds and other instruments of conveyance thereof to the purchaser or purchasers.*" (emphasis added).

The Bank declined to act as co-executor of Decedent's estate and on January 19, 1979, the Bank filed its Declination to act as co-executor with the Court. On that same day, Respondent Adomaitis filed her Application for Testamentary Letters and was thereafter appointed sole Executrix of Decedent's Estate.

A first partial accounting for the period December 20, 1978 to August 31, 1979, was approved at hearing before the Cuyahoga County Probate Court on October 22, 1979. A second partial accounting, covering the period September 1, 1979 to September 15, 1980, was approved, after hearing, on December 1, 1980.

Toward the end of 1980, it became apparent that the debts of Decedent and the costs of administration could not be satisfied without the sale of the two real estate lots from Decedent's residual estate. Very few of De-

cedent's assets were in liquid form. The monies remaining in Decedent's bank accounts were needed either to pay on-going administrative expenses, or to satisfy specific monetary bequests found in Decedent's Will. In addition, much of Decedent's personal property had been earmarked for specific bequests. Consequently, Respondent Adomaitis decided to sell the three contiguous parcels of real property, including the two parcels comprising part of Decedent's residual estate, for proper administration of Decedent's estate.

Toward this end, Respondent Adomaitis entered into an initial Option Agreement with Respondent City on November 20, 1980, for the sum of Five Thousand Dollars (\$5,000.00).² The City renewed the Option on December 23, 1980, for the sum of Forty-Five Thousand Dollars (\$45,000.00). The Option was again renewed and the sum of Ten Thousand Dollars (\$10,000.00) was paid by the City on March 24, 1981. Respondent City finally exercised its Option and an Executor's Deed, transferring title to all three parcels to the City, was recorded on or about July 12, 1981. The total purchase price, One Hundred Sixty Thousand Dollars (\$160,000.00), paid by Respondent City was approximately Twenty-Four Thousand Dollars (\$24,000.00) over the appraised value for the three parcels of One Hundred Thirty-Six Thousand Dollars (\$136,000.00). These sale proceeds were tendered to Respondent Adomaitis.

A third partial accounting for the period September 15, 1980, to October 23, 1981, was approved by the Probate Court after hearing on January 11, 1981. This partial accounting showed that the three parcels of real estate had been sold and set forth the amount which each

2. In early 1980, the Respondent, City of Shaker Heights, developed an urban renewal project and decided to purchase, simultaneously if possible, the three parcels of land comprising a part of Decedent's estate at issue in this lawsuit.

parcel of real estate had commanded upon sale, minus the total amount of settlement charges. On December 28, 1982, a distribution of sale proceeds was made to and written acceptance thereof was made by the Trustee of the trust created by Decedent's Will for the benefit of Petitioner Ziechmann.

A fourth partial accounting was made for the period October 24, 1981, to December 30, 1982. This partial accounting was approved by the Probate Court, after hearing, on October 3, 1983. This partial accounting showed that distributions had been made to the Trustee who managed the Trust created for the benefit of Petitioner Ziechmann.

REASONS FOR DENYING WRIT OF CERTIORARI

A. PETITIONER DID NOT RAISE A FOURTEENTH AMENDMENT DUE PROCESS ISSUE IN STATE COURT AND HAS PRESENTED NO FEDERAL QUESTION FOR REVIEW BY THE U.S. SUPREME COURT

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. Section 1257(3), claiming that an issue involving the due process clause of the Fourteenth Amendment to the U.S. Constitution was first raised "by inference" in Petitioner's Memorandum to the Ohio Supreme Court. (Petitioner's Brief, page 3). Petitioner thus seeks a Writ of Certiorari from this Court on the ground that a "title, right, privilege or immunity [was] specially set up or claimed under the Constitution . . . of . . . the United States." [28 U.S.C. §1257(3)].³

3. The other two instances where discretionary review can be had under U.S.C. §1257(3) do not exist in this case. Petitioner has not questioned either the validity of a treaty or statute of the United States, or the validity of a state statute as being repugnant to the Constitution, treaties or laws of the United States.

Petitioner's attempt to invoke discretionary review by this Court under this particular clause of 28 U.S.C. Section 1257(3), however, is doomed to failure. First, there is no substantial federal question presented for review by this Court. Second, even if a federal question exists, Petitioner did not properly raise his due process claim before the state courts below and no adjudication was had on this alleged issue. Therefore, this case is not one which merits review by this Court.

In order to warrant review through a Writ of Certiorari, it is well settled that a state court decision must present a substantial federal question for resolution. See *Duncan v. Tennessee*, 405 U.S. 127, 31 L. Ed. 2d 86 (1972); *Benz v. New York State Thru Way Authority*, 369 U.S. 147, 7 L. Ed. 2d 634 (1962). No issue of this sort is presented here.

Petitioner alleges that the state court's dismissal of his action, based upon certain state statutory provisions and Ohio substantive law, amounted to a denial of due process, apparently because the state court simply declined to see the import or application of Ohio Revised Code Section 2717.02 to the facts at bar. The due process clause of the Fourteenth Amendment, however, does not make all questions pertaining to state law constitutional questions, nor does it enable the U.S. Supreme Court to revise decisions of state court upon questions of state law. *Enterprise Irrig. Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 157, 61 L. Ed. 644 (1971). A party who seeks an opportunity in state court to litigate rights claimed by it cannot have the state court judgment reviewed by the U.S. Supreme Court on the ground that due process of law was denied because the litigation did not result successfully. *Remington Paper Co. v. Watson*, 173 U.S. 443, 43 L. Ed. 762 (1899).

Thus, something more than mere possible misconstruction of state law or local ordinance by the state court is necessary to present a due process question sufficient for Supreme Court review. *Seattle R. & S.R. Co. v. Washington*, 231 U.S. 468, 58 L. Ed. 372 (1913). In this case, Petitioner has clearly failed to establish that "something more". Rather, Petitioner intimates only a belief that the state court ruled improperly in this case and that, therefore, dismissal of his lawsuit amounted to a denial of due process. Thus, Petitioner offers to this Court nothing more than an opportunity to review a state court decision premised upon state law—no federal question is presented and Certiorari is properly denied.

Even if a substantive federal question has been formulated by Petitioner, it is axiomatic that questions not raised or discussed in state courts cannot be urged in the U.S. Supreme Court. *Mellon v. O'Neil*, 275 U.S. 212, 72 L. Ed. 245 (1927). Thus, a federal question relied upon to confer jurisdiction on the U.S. Supreme Court cannot be first raised before this Court. *Wabash R. Co. v. Flannigan*, 192 U.S. 29, 48 L. Ed. 328 (1904). See also *United States Homes Ins. Co. v. Dick*, 281 U.S. 397, 74 L. Ed. 926 (1930); *Bailey v. Anderson*, 326 U.S. 203, 90 L. Ed. 3 (1945).

In order to invoke review under 28 U.S.C. Section 1257(3), the alleged federal right must in some way have been drawn to the attention of the state court so that it knew or, from the nature of pleadings, was held to have known that a federal right was before it for adjudication and was denied. *St. Louis I.M. & S.R. Co. v. Starbird*, 243 U.S. 592, 61 L. Ed. 917 (1917); *Baker v. Baldwin*, 187 U.S. 61, 47 L. Ed. 75 (1902). In essence, the federal right, title, privilege or immunity relied upon must have been

specially set up or claimed in the state court at a proper time and in a proper way and a decision must have been made against the right, title, privilege or immunity so claimed. *Schuyler Nat'l Bank v. Bollong*, 150 U.S. 85, 37 L. Ed. 1008 (1892). Such federal right, however, cannot be a matter of mere inference, but must be raised by averments so distinct and positive as to place it beyond doubt that a federal right was asserted. *Union Mutual Life Ins. Co. v. Kirchoff*, 169 U.S. 103, 42 L. Ed. 677 (1898). See also *Wade v. Lawder*, 165 U.S. 624, 41 L. Ed. 851 (1897).

Here, no federal right under the due process clause of the Fourteenth Amendment was raised before or considered by the state courts of Ohio. In fact, Petitioner admits that his alleged due process claim was first raised "by inference" only in his Memorandum to the Ohio Supreme Court. Petitioner thus unwittingly admits to the insufficiency of his request for a Writ of Certiorari under 28 U.S.C. Section 1257(3). Furthermore, a careful reading of Petitioner's Memorandum to the Ohio Supreme Court reveals that if a constitutional claim was raised "by inference" before the Ohio Supreme Court, such "inference" exists only in Petitioner's mind and *not* in his pleadings (see Appendix A1-A7). Clearly, a Writ of Certiorari should not issue in this case.

B. THE OHIO COURT OF APPEALS' DECISION WAS BASED ENTIRELY ON APPLICATION AND INTERPRETATION OF OHIO LAW

The Court of Appeals affirmed the Common Pleas Court's April 16, 1985 dismissal of this action based upon review of factual issues germane to the case and upon interpretation of Ohio statutory law and application of relevant Ohio case law.

First, the Court of Appeals agreed with the Common Pleas Court that Decedent's Will authorized Respondent Adomaitis, as Executrix, to sell the parcels of land at issue.⁴ The Court of Appeals concluded that Respondent Adomaitis, being vested with the testamentary power to sell the real estate in question, could proceed to sell same without first seeking Probate Court approval as expressly allowed by Ohio Revised Code Sections 2113.39

4. In an attempt to invoke appellate jurisdiction of the Ohio Supreme Court, Petitioner advanced a novel argument, not previously raised in either the trial court or the Court of Appeals and contended that Item VIII of Decedent's Will, a provision which applied only to the Trustee and not the Executrix, required an affirmative vote by the trust beneficiaries before a sale of the two parcels at issue could be accomplished. This eleventh hour attempt by Petitioner Ziechmann to improperly invoke review by the Court, however, was unsuccessful, i.e., Petitioner's Motion to Certify was denied by the Ohio Supreme Court. Petitioner's recitation of facts in the Petition before this Court, however, again states, as if it were established fact, that: "[t]his sale took place without the consent of a majority of the beneficiaries as required by the terms of the will." This assertion, however, is simply untrue.

Item VIII of Decedent's Will provides, in pertinent part, that:

. . . no sale shall be made by the Trustee unless and until a majority of the owners shall be in accord as to the terms of the sale. . . (emphasis added)

By contrast, Item IX authorized and empowered the Executrix of Decedent's Estate to:

. . . sell at private or public sale, at such prices and upon such terms and conditions as [she] may deem best, any part or all of my property, real or personal, needed to pay debts or general bequests. . . (emphasis added)

Logically, Respondent Adomaitis, the duly appointed Executrix of Decedent's Estate, was not bound by the provisions of Item VIII, a clause which applied exclusively to the Trustee. Furthermore, no Trustee had been appointed at the time the sale of the real estate to Respondent City occurred, so the provisions of Item VIII of Decedent's Will never came into play. The first order of business was for the Executrix to satisfy administrative costs and expenses. It was only after debts of the estate were satisfied that the Executrix could determine what, if anything, remained as residue of the estate for use as the trust corpus. Until that determination was made, no Trustee was necessary.

and 2127.01. Ohio substantive law supported the Court of Appeals' conclusion. *Bilikam v. Bilikam*, 2 Ohio App. 3d 300 (Franklin County, 1982); *Burroughs v. Raymond*, 65 Ohio L. Abs. 108, 50 Ohio Op. 169 (P. Ct. Summit County, 1951).

Second, the Court of Appeals found that Respondent Adomaitis properly invoked her testamentary power of sale regarding the two parcels of land, together with the adjacent third, in order to pay administrative costs and other debts of Decedent's estate. Based upon the facts presented to it, the Court of Appeals found that the debts of the estate, which included fiduciary and attorney fees, Ohio and Federal estate taxes, administrative costs and expenses, and miscellaneous debts and claims against the estate, could not be satisfied unless the real property of the estate was sold. Under Ohio substantive law, these items clearly constituted debts of the estate. *In re: Bankcroft's Estate*, 81 Ohio L. Abs. 548 (Franklin County, 1959); *In re: Jacoby's Estate*, 79 Ohio L. Abs. 247 (P. Ct. Butler County, 1958); *In re: Haggerty's Estate*, 70 Ohio L. Abs. 463 (P. Ct. Cuyahoga County, 1955). And, pursuant to Decedent's Will and Ohio Revised Code Section 2117.25 (A), the debts of the estate, including costs and administrative expenses, were to be first satisfied and payable out of the assets of the estate.

Finally, the Court of Appeals affirmed the trial court's interpretation of Ohio law that a declaratory judgment action was not the appropriate vehicle by which to challenge the sale of this land. The Court of Appeals concluded that this case was not a simple action seeking interpretation of Decedent's Will. Rather, the Court of Appeals viewed this case as an attempt by Petitioner to vacate the third partial accounting approved by the Probate Court in 1981 and to void the 1981 sale of the real property

at issue by way of a declaratory judgment. Thus, the Court of Appeals looked to the provisions of Ohio Revised Code Section 2109.35 which specifically governed fiduciary accounting, and not to the generic declaratory judgment provisions of Ohio Revised Code Section 2717.02.

Ohio Revised Code Section 2109.35 expressly states that "the order of the Probate Court upon the settlement of a fiduciary's account shall have the effect of a judgment. . . ." A partial or final accounting is, by definition, a settlement of a fiduciary's account. The adjudication by the Probate Court that certain inventoried property constitutes an asset of a decedent's estate and is lawfully included in the inventory thereof is, under Ohio substantive law, *res judicata* as to the parties to such proceeding. *Bolles v. The Toledo Trust Co.*, 17 Ohio Op. 156 (Sup. Ct. 1940). Under Ohio law, such adjudication remains *res judicata* unless successfully appealed in the manner set forth in Ohio Revised Code Section 2109.35. A declaratory judgment proceeding, for example, cannot be used to vacate an order of the Probate Court upon the settlement of a fiduciary's account.⁵

The Court of Appeals found that the third partial accounting included the sale proceeds of all three parcels of real estate as inventory (receipts) of Decedent's estate and that no objection to the sale of the two parcels of land was made by Petitioner Ziechmann at that time

5. In *Third National Bank v. Gardner*, 53 Ohio Op. 2d 261 (Butler County, 1970), the court specifically stated:

Section 2109.35 of the Revised Code provides that the order of the Probate Court upon the settlement of a fiduciary's account shall have the effect of a judgment, and may be vacated only as provided therein. A declaratory judgment proceeding is not one of the methods provided.

Id. at 263.

or promptly thereafter. Having failed to challenge the third partial accounting as provided for in Ohio Revised Code Section 2109.35, the approval of the partial accounting by the Probate Court was found to be *res judicata* under Ohio law as to Petitioner Ziechmann and dismissal of the action was affirmed.

Obviously, the Court of Appeals' decision in this case was based upon and reflects interpretation and application of Ohio statutory and substantive law to the facts of this case. This Court has repeatedly stated that it will not review state court decisions based upon adequate and independent non-federal grounds, even where a federal question is involved. *Berea College v. Kentucky*, 211 U.S. 45, 53, 53 L. Ed. 81 (1908); *Murdock v. Memphis*, 87 U.S. 590, 634-636, 22 L. Ed. 429 (1874). Furthermore, where the state court judgment rests entirely on state law and is grounded upon non-federal issues, Certiorari has been consistently denied. See *Adams v. Russell*, 229 U.S. 353, 57 L. Ed. 1224 (1913); *Eustis v. Bolles*, 150 U.S. 361, 37 L. Ed. 1111 (1893). The exclusive state law basis for the Court of Appeals' decision, therefore, presents another reason why this Court should not grant review.

C. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR THIS COURT TO REVIEW THIS CASE ON CERTIORARI UNDER U.S. SUPREME COURT RULE 17

Rule 17 of the Rules of the Supreme Court of the United States provides, in pertinent part, that:

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor

fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

As demonstrated above, this case does not involve any federal question of substance and this Court has consistently held against the granting Certiorari under the circumstances presented here. In addition, the state court decision below does not, in any way, conflict with applicable decisions of this Court. Furthermore, Petitioner has presented no other special or important reasons for review by this Court and none exist. Indeed, the unique nature of this case weighs heavily against issuance of a Writ of Certiorari.

This case was dismissed prior to trial on the merits for failure to state a claim and upon the principles of *res judicata*. Nonetheless, an extensive documentary and factual record was developed by Respondent City and others to support their respective Motions to Dismiss/Motions for Summary Judgment which were granted by the Common Pleas Court. Further, as is apparent from the state court decisions below, and in particular, the Court of Appeals' opinion, dismissal of Petitioner's case was based solely upon interpretation of Ohio statutory and substantive law applicable to the facts presented in this case.

These facts are, in many respects, unique and little likelihood exists that a similar case will ever arise elsewhere. Rather, even a cursory review of the salient facts and procedural history of this case reveals that this case

is of great and all-consuming interest only to Petitioner and his lawyers.⁶ Review of this decision by this Court would, therefore, be limited to the specific factual considerations presented herein and would have little, if any, general application or impact.

6. In fact, this lawsuit is the last remaining of a trilogy of lawsuits involving Petitioner, Respondent City and other common parties, in which Petitioner has repeatedly attempted to vindicate his personal rights over real property comprising of F. Karl Ziechmann Estate.

CONCLUSION

Based on the foregoing, Respondent City of Shaker Heights, Ohio, respectfully submits that the Writ of Certiorari prayed for in this action should be denied because:

- (1) No substantial federal question was raised in state court or presented for resolution in this action before the U.S. Supreme Court;
- (2) The state court of appeals' decision below rests entirely on interpretation of Ohio statutory law and application of long established rules of Ohio substantive law; and
- (3) The decision below turns upon facts so unique and so inconsequential that any decision by this Court in this case will have little precedential impact.

Respectfully submitted,

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APPENDIX

Case No.

IN THE SUPREME COURT OF OHIO,

COLUMBUS, OHIO

ON APPEAL FROM THE COURT OF APPEALS OF CUYAHOGA
COUNTY, EIGHTH APPELLATE DISTRICT, CASE No. 50264

WILLIAM K. ZEICHMANN, *et al.*,
Appellants,

vs.

CHARLOTTE ADOMAITIS, *et al.*,
Appellees.

MEMORANDUM IN SUPPORT OF JURISDICTION

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[1] STATEMENT OF FACTS
AND OF THE CASE

Plaintiff-Appellant, William K. Ziechmann, is a beneficiary (nephew) of the Estate of F. Karl Ziechmann, who died testate on December 28, 1978. According to the terms of the will, certain parcels of land were to pass into a testamentary trust, the beneficiaries of which were the plaintiffs-appellants in this action. It was not until almost three years after the will was probated, that a trustee was appointed to this testamentary trust who could protect the interests of the beneficiaries.

Between the time the will was presented for probate and when a trustee was finally appointed, Executrix Charlotte Adomaitis sold the real property which was to be the res of the trust. This sale took place without the consent of a majority of the beneficiaries as required by the terms of the will. The executrix did this upon the fraudulent pretext that the value of the estate's debts exceeded the value of the estate's personal property.

Since the executrix violated her duty to satisfy the debts of the estate by first exhausting the personal property assets of the estate before selling any of the estate's real property, the plaintiff-appellants brought an action for declaratory judgment that the sale of the property by the defendant-appellee was illegal and violated the terms of the will.

[2] This appeal is from a judgment of the Court of Common Pleas dismissing plaintiff's complaint pursuant to Civil Rule 12(B)(6), a judgment, which was affirmed by the Eighth District Court of Appeals sitting in Cuyahoga County, Ohio.

[3] LAW AND ARGUMENT

PROPOSITION OF LAW NO. 1:

THE COURT ERRED IN ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED ON APRIL 16, 1985, IN THE SUBJECT ACTION.

A declaratory judgment is a proper method bringing an exception to an account before a court. O.R.C. §2721.05 states:

Any person interested as . . . devisee, legatee, heirs . . . in the administration of a trust, or of the estate of a decedent, . . . may have a declaration of rights or legal relations in respect thereto in any of the following cases:

(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

This provision applies to property disposed of prior to the commencement of the action for declaratory judgment. See: *In Re Morrison*, 159 O.S. 285, 50 OO 291, 112 N.E. (2d) 13 (1953).

Furthermore, O.R.C. §2721.02 states expressly:

No action or judgment is open to objection on the ground that a declaratory judgment or decree is prayed for.

As the plaintiff-appellants' Complaint did allege facts sufficient to state a cause of action, the court must state the rights, if any, to which the plaintiff is entitled, and a Civil Rule 12(B)(6) to the Complaint should not be [4] sustained. See: *Brickerman v. Brickerman & C. Co.*, 72 App. 471, 27 OO 419, 50 N.E. (2d) 369.

The rulings of the lower courts that, as there were no objections raised when the partial accounts were filed, extinguishes the plaintiff-appellants' cause of action on the basis of *res judicata* is completely contrary to the case law. When fraud is present, it will avoid any settlement of an account even though no exceptions were taken at the time of the filing of the account. See: *Hoover v. Hoover, Admr.*, 90 O.App. 148 (1950); *In Re Estate of Russell*, 60 O.App. 385 (1938); and *Rote v. Stratton, et al.*, 2 Ohio Nisi Prius 27 (1895).

Ohio Rule of Civil Procedure 54(c) states that:

... every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled.

The plaintiff-appellants are victims of a gross fraud and are suffering because of it. The lower courts have erroneously ruled against them and have not granted them the relief to which they are entitled. It is the duty of the Ohio Supreme Court to reverse these decisions and remand the case back to the trial court for a hearing where the plaintiff-appellants will be able to present their evidence before an impartial trier of fact so that their claim may be fairly adjudicated.

[5] STATEMENT IN SUPPORT OF JURISDICTION

This case is of public or great general interest. Every year thousands of estates are probated in the Court of Ohio. To sustain the rulings of the lower courts would grant a license to unscrupulous probate attorneys, administrators, executors, and trustees to prey upon unsuspecting heirs and beneficiaries who are unfamiliar with probate procedure.

Further, to rule against the plaintiff-appellants would work a gross injustice upon them individually.

The decisions of the lower courts that the plaintiff-appellants failed to state a claim upon which relief may be granted is blatantly contrary to O.R.C. §2721.02, and their decisions that the plaintiff-appellants' claim is also barred by res judicata because they failed to take exception to the partial accounts when they were filed, is against all the case law since there is the existence of fraud.

The Court's consideration of this appeal will serve to insure the integrity of the probate process.

Respectfully submitted,

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Attorney for Appellants.

[6] CERTIFICATE OF SERVICE

A copy of the foregoing was sent this 13th day of May, 1986 to Ms. Linda Gebauer Mayer, Esq., Rippner, Schwartz & Carlin, 960 Illuminating Building, Cleveland, Ohio 44113; Mr. Charles T. Riehl, Esq., Walter, Haverfield, Buescher and Chockley, 1215 Terminal Tower, Cleveland, Ohio 44113; Mr. Sherman Hollander, Esq., 1620 Standard Building, Cleveland, Ohio 44113; and Mr. John E. Kohler, Esq., 8905 Lake Avenue, 210 Cliflake Building, Cleveland, Ohio 44102.

MATTHEW GILMARTIN